

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1097 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
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DAHYABHAI CHHIBADBHAI KAMALI

Versus

STATE OF GUJARAT

Appearance:

MR MAHENDRA K PATEL as AMICUES CURIUE for Petitioner
MR ST MEHTA ADDL.PUBLIC PROSECUTOR for the State

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 29/07/98

ORAL JUDGEMENT

This criminal appeal, by invoking aids of provisions of Sec. 374(2) of the Code of Criminal Procedure, 1973 (the "Code" for short) is filed by the appellant original accused challenging the judgment and order of recording conviction dt. 25/9/1997 in Sessions Case No. 130 of 1996 by the learned Additional Sessions Judge, Valsad District at Navsari, whereby the appellant was convicted for the commission of offence punishable under Sec. 304 Part II of the Indian Penal Code (the "I.P.C." for short) and was sentenced to suffer R.I. for seven years and to pay a fine of Rs.1,500/- and i/d of payment of fine, to undergo further R.I. for a period of three months.

2. It is the case of the prosecution that the victim deceased Vasantbhai Chhibadbhai Kamli and accused Dahyabhai Chhibadbhai Kamli were the real brothers. Both of them and their other brother Jayantibhai Chhibadbhai Kamli resided separately. The ancestral properties of these three brothers were partitioned. The land came to the share of Jayantibhai was cultivated by the deceased Vasantbhai Chhibadbhai Kamli, as the said Jayantibhai is serving as a Peon in Umergaon Taluka Panchayat office. It is the case of the prosecution that frequently, a quarrel had been taking place between the deceased Vasantbhai and Dahyabhai in respect of cultivation of the land which had come to the share of Jayantibhai. Both of them were in enimical terms. It is the further case of the prosecution that on the fate of the day i.e. on 12/5/1996 at about 7-00 O'clock evening, the deceased Vasantbhai had gone to the village Fanasa Bazaar for some work. At about 8-00 O'clock, one Naginbhai Harapati of that village came to the house of deceased and informed his son Ravindra that his father was lying near culvert of the lake and as he was injured on the hip portions, the blood was coming out and therefore, the complainant Ravindra along with his brothers Haresh and Naresh in the company of Suresh Shantilal and Janubhai Vishnubhai of their locality went there and they saw that his father deceased Vasantbhai was lying there and injury was caused on the right hip portion of the deceased Vasantbhai and that the blood was coming out from that injured portion. During inquiry from the deceased father about the name of the assailant, it was stated by the deceased that when he was returning from Fanasa Bazaar to his residence, his elder brother Dahyabhai gave blow with the spear and after inflicting the spear blow, he fled away. Thereafter the complainant took the victim deceased in Rickshaw to Sarigam Police Station and from there with Yadi, he went with deceased Vasantbhai to Bhilad Government Hospital for further treatment. The complaint in respect of the aforesaid incident was also lodged by Ravindra Vasantbhai Kamli with Sarigam Out Post Police Station on 12/5/1996. The said complaint was recorded by Head Constable Sudam Ganapati, and investigation was entrusted to him. On the basis of the said information, complaint was registered and he started the investigation. He visited the scene of occurrence, drew panchnamna of the scene of offence and recorded the statement of several witnesses and then went to Bhilad Government Hospital and after meeting the concerned Doctor and after verifying that the deceased was in conscious condition, he recorded the statement of the deceased. On the basis of the statements recorded, the accused was arrested and discovery panchnama was drawn

and during the course of treatment, victim Vasantbhai succumbed to the injuries, and therefore, the offence under Sec. 302 was added and report in that regard was sent to the concerned Magistrate and further investigation was entrusted to P.S.I. Mr. M.V. Nayak.

3. On receipt of F.S.L. report and autopsy report and on completion of the investigation, the accused was chargesheeted for the offence punishable under Sec. 302 of I.P.C. for committing the murder of his brother Vasantbhai, and after the case was committed to the concerned Sessions Court, the accused was tried by the learned Additional Sessions Judge, Valdas District at Navsari in Sessions Case No. 130 of 1996.

4. On consideration of the evidence, the learned Additional Sessions Judge came to the conclusion that the statement of the complainant Ravindra Vasantbhai before whom the deceased had made a statement with respect to the injuries caused to the deceased is in the nature of Dying Declaration and statement recorded by Police Head Constable Sudam Ganpati is also in the nature of Dying Declaration. Reliance can be placed upon both the pieces of Dying Declarations. The learned trial Judge also found that the oral testimony of Ravindra Vasantbhai Kamli and Head Constable Sudam Ganpati recorded in that regard is so crystal clear that not only one would raise any doubt or suspicion about it, but it would inspire confidence about their truthfulness and trustworthiness. Their oral testimony gets full corroboration with the complaint Ex.12 and statement of the deceased Ex.10. The learned trial Judge has further held that the offence of homicidal death of the deceased Vasantbhai caused by the accused is proved beyond shadow of doubt. However the learned trial Judge also came to the conclusion that homicidal death is not a murder but it is a culpable homicidal death not amounting to murder punishable under Sec.304 Part II of I.P.C. and therefore the learned trial Judge was pleased to convict the accused for the commission of the offence which is punishable under Sec.304 Part II of I.P.C. and sentence the accused as stated hereinabove. It is this recording of judgment and order of conviction and sentence imposed by the learned Additional Sessions Judge upon the accused for the offence punishable under Sec. 304 Part II of I.P.C. which is impugned and is the subject matter of this appeal before me.

5. The learned advocate Mr. Mahendra K. Patel appearing as amicus curiae appointed by this court for the appellant accused urges that the learned Additional

Sessions Judge was not justified in convicting the accused merely relying on the evidence of the complainant at Ex. 11, the complaint Ex.12 and the statement of the deceased at Ex.10 recorded by the Head Constable Sudam Ganpati. Both complaint Ex.12 and statement Ex.10 are crystallized with so many contradictions and improvements. So far as the oral testimony of the panchas for making discovery panchnama with respect to the discovery of weapons who having turned hostile is concerned, the learned trial Judge ought not to have been placed reliance on their oral testimony and panchnama itself. On this count, he assailed the judgment and order of recording conviction against the appellant and therefore according to him, recording of conviction by the learned trial Judge on the basis of this piece of evidence is bad in law which requires to be set aside and quashed by allowing this appeal and the appellant accused may be acquitted of the offence for which he was charged. Alternatively, he also urges that if this court found that the aforesaid submission is devoid of any merits, in that case, sentence of seven years is too harsh and stringent. He also submitted that there are catana of decisions of Apex Court and this Court for imposition of sentence of either 4 or 5 years to the convict of the offence punishable under Sec.304 Part II of I.P.C. and therefore, sentence may be suitably modified by commuting the same i.e. for 4 years instead of 7 years.

6. In the contrary submissions, Mr. Mehta, the learned APP for the respondent- State of Gujarat has vehemently tried to emphasize that no error of law or on facts is committed by the learned Additional Sessions Judge in weighing the evidence of the complainant and his complaint Ex.12 and the statement of the deceased recorded by Head Constable Sudam Ganpati at Ex.10 which is in the nature of Dying Declaration and in that view of the matter, he has further submitted that oral testimony of the complainant Ravindra gets full corroboration from the complaint as well as statement of the deceased Vasantbhai at Ex.10 recorded by Head Constable Sudam Ganpati. He also further submitted that though panchas of the discovery panchnama of the weapon used for the commission of crime have turned hostile, on their evidence, it can hardly be decided the guilt of the accused. As there are cogent, reliable and trustworthy evidence with respect to the blow inflicted by the accused by the spear he is having, upon the deceased only and non-else, and therefore, according to him, the learned trial Judge has very rightly appreciated the evidence and reached just and correct conclusions and recorded findings of convictions under Sec.304 Part II of

I.P.C which does not call for any interference by this court while sitting in appeal. On the contrary, it requires affirmation of this court and therefore, appeal is devoid of any merits which requires to be dismissed and accordingly it may be dismissed.

7. In view of the aforesaid submissions of both the learned advocates, let us examine the evidence adduced and produced by the prosecution. In the instant case, prosecution has examined in all 16 witnesses and their oral testimony was also recorded and also placed reliance on the documentary evidence like panchnamas, complaint at Ex.12 and statement of the deceased at Ex.10, autopsy report and F.S.L. report etc.

8. Before advertng to the evidence part, it may be noted that victim deceased and the accused were the real brothers. They had disputes with respect to the cultivation of the land coming to the share of Jayantibhai which was being cultivated by the deceased, and therefore, accused was having grudge against the deceased. In my opinion, therefore, the question of wrong identification given by the deceased does not arise at all in this case.

9. In this backdrop, now let us examined the prosecution evidence. In order to prove guilt against the accused, the prosecution mainly relied on the statement of the deceased which was recorded by the Head Constable Sudam Ganpati Hedke as well as statement made by the deceased before his son and on the basis of the said statement, lodging of complaint by his son Ravindra before the concerned Police Station. Now in this regard, P.W. No.2 Ravindra Vasantbhai Kamli, the son of the deceased Vasantbhai was examined and whose oral testimony was recorded at Ex.11. He has, inter alia, testified that the deceased was his father, and the accused is his uncle who is elder than his father. Jayantibhai is also his uncle who is younger brother of the deceased father of the accused. Their ancestral property has been partitioned and the agricultural land which had come to the share of his uncle Jayantibhai who was serving as a Peon in the Taluka Panchayat Office at Umergaon was being cultivated by his father. Therefore, the accused who is his uncle had a grudge with his father and because of this, frequent quarrels had also taken place and on 12/5/1996, his uncle Dahyabhai inflicted injuries to this father. On receipt of said information from Naginbhai, about injury caused to his father, he along with two brothers and uncle and people of the village went there, where his father was lying and injury was caused on the

hip portion of the deceased and blood was coming out. On being inquired by him about name of the assailant, the deceased father of the complainant replied that his (deceased) brother Dahyabhai had inflicted the blow with the spear and injury was caused. Thereafter, he went to the Police Station where he lodged the complaint which bears his signature and it is on record at Ex.12. He has further testified that during further treatment and operation, his father succumbed to the injuries which he had received. It may be appreciated that during the cross-examination of this witness, attempt was made by the defence to prove that his father was consuming alcohol and therefore his liver was damaged, and therefore, because of the damage to the liver, he has died. This suggestion was repelled by the accused. It was also suggested that in order to snatch away the land which had come to the share of his brother Dahyabhai, a false complaint has been lodged against him, but that suggestion was also repelled by the witness. In the circumstances, this witness withstood the test of the cross-examination and nothing substantial has been brought out to prove innocence of the accused.

10. Now so far as complaint Ex.12 is concerned, on having looked at the same, it can be made out that there is no improvement in the evidence of this witness, nor any contradictions were brought on record, and nor the witness has given go-bye to the complaint. In some and substance, Ex.12 gets full corroboration from the oral testimony on oath of the complainant Ravindra Vasantbhai Kamli.

11. The prosecution also placed reliance on the oral testimony of Harish Vasantbhai Kamli (P.W.No.7) at Ex.22, and Jayanti Chhibadbhai Kamli (P.W.No.12) at Ex.27 the brother of the deceased. Jayantibhai at Ex.27 who happened to be the brother of the deceased and Harish at Ex.22 who happens to be the son of the deceased have supported the prosecution story that both of them accompanied Ravindra to the place of occurrence, where the deceased was laying in injured condition. They also testified that in their presence, deceased has narrated the entire incident and has given the names of the assailants.

12. In view of the aforesaid oral evidence of three witnesses, including the complainant at Ex.12, one can jump to the conclusion that the prosecution has proved beyond doubt so far as guilt of the accused is concerned. There is no question of wrong identification. There is also no question of falsely implicating the accused as

they are the family members, much less Jayantibhai happens to be the brother of both i.e. accused Dahyabhai and deceased Vasantbhai.

13. Now next the prosecution placed reliance on the statement of the deceased recorded by Head Constable, Sudam Ganpati during the course of investigation which is on record at Ex.10. It may be appreciated that the proposition of law cannot be disputed that the statement of the deceased recorded during the course of investigation is the Dying Declaration and once the court found that the statement is genuine, same can be relied upon by exhibiting the same.

14. Now let us examined the oral evidence P.W.15 Ex.35 Sudam Ganpati. He has, inter alia, testified that on 12/5/1996, he was in charge of Sarigam Out Post. The complainant came at the said Police Station at 11-30 night and gave complaint which was recorded as per narrations of the complainant and during the course of investigation, he went to the hospital where he recorded the statement of the deceased which is at Ex.10. During the cross-examination, he has testified that he reached the dispensary for the first time i.e. on 13th between 11-45 to 12-00 p.m. noon. He has in his evidence admitted that he has not written any Yadi to the Executive Magistrate for recording the Dying Declaration of the deceased. He has also stated that before recording the statement by him, he has not obtained any written endorsement from the concerned Doctor, whether the deceased was in a fit condition to give the statement. On overall appreciation of the evidence of the aforesaid witness, it can be assumed that he who recorded the statement of the deceased which is on record at Ex.10. It is true that he has not obtained any endorsement of the concerned Doctor with respect to the physical condition of the patient. However he stucked to the version that he has recorded the statement after consulting the concerned Doctor and in his presence, the endorsement to that effect was also obtained beneath to this statement. Now let us examined the statement at Ex.10 in order to find out whether the oral testimony of Head Constable, Sudam Ganpati Hedke and the statement recorded by him at Ex.10 gets corroborations from each other. On having looked at the said statement which is on record at Ex. 10, it appears that it is recorded on 13/5/1995 and at the bottom of the said statement, an endorsement is made that it was recorded in presence of Dr. B.I.Sukhiwala, Superintendent (Class-I) Community Health Centre, Bhilad (Tal. Umergaon) beneath said statement. In the said statement, the deceased had also

inter alia disclosed his family background, partition of the property amongst the family member and the property which he had come to share of each of the respective brothers. He has also disclosed that as he was cultivating the land which has come to the share of his younger brother Jayantibhai, his elder brother Dahyabhai was not liking, and therefore, he had been intending to quarrel with the deceased frequently. He further stated that on 12/5/1996 at 7-00 P.M., when he had gone to the Doctor at Fanasa village, his elder brother Dahyabhai met him on the way but he did not speak anything and he went to his house, but while he was returning from village Fanasa to his residence at 7-30 P.M. near culvert, his younger brother Dahyabhai was standing on the road side. After passing through him, suddenly from behind, his elder brother Dahyabhai inflicted a blow with the spear which pierced on the right hip portion of the deceased and after piercing out the same, he took out the spear and profuse blood has come out and became unconscious and he fell down. Meantime, Nagin Harpati of his village who was passing through the said road, he shouted and called him and informed about assaulting him by his elder brother Dahyabhai and told to give information to his son and on his information, his son Ravindra, Haresh, Naresh and other people of the village came there and they removed him (Vasantbhai) in Rickshaw.

15. Now on overall appreciation of oral evidence and testimony of Sudam Ganpati, Head Constable recorded at Ex.35 and the statement of the deceased at Ex.10, which, according to me, gets corroboration to each other, and under no circumstance, one can raise any doubt or suspicion about these two pieces of evidence. Before recording the said statement, Ganpat Hekde consulted the concerned Doctor who certified that the deceased was in fit condition to give his statement.

16. The fact that the deceased was fit in physical condition to give the statement, was also proved by the oral testimony of the Doctor who treated the deceased initially. In that regard, a reliance was placed upon the oral testimony of P.W.1 Dr. Bipinchandra Lallubhai Sakhiwala, which is on record at Ex.8. He, inter alia, testified that on 12/5/1996, when he was discharging his duties as Medical Office of Bhilad Community Health Centre, one Vasantbhai Chhibadbhai was brought to him with Police Yadi. His relative Naresh Vasant Kamli had also come with him. On being asked to the deceased about the incident, he had narrated that at 7-30 p.m. on the very day, injury was caused to him by spear. He also testified that on the next day, Police recorded his

statement. He was present at that time and the patient was conscious and in fit condition to give statement. He has also endorsed with respect to the consciousness and physical fitness of the deceased for giving the statement. He also stated that in his presence, statement was recorded. It may be appreciated that this witness withstood the test of cross-examination and nothing substantial has been brought out from his evidence. In view of the aforesaid state of affairs, it cannot be gainsaid that the statement of the deceased recorded by him at Ex.10 was not a Dying Declaration as before recording the same, he had already consulted Dr. Bipinchandra L. Sakhiwala and the statement Ex.10 unequivocally raises ones' finger towards the appellant accused only and none-else. In view of this unimpeachable evidence, no doubt or suspicion can be raised against the prosecution evidence. The prosecution has successfully brought home the charges levelled against the appellant accused.

17. Now so far as evidence of other witnesses are concerned, though they have turned hostile, their evidence is of no avail or assistance to the defence. If we brush aside or wash out their evidence, in that case also the evidence of the complainant Ravindra, complaint Ex.12, evidence of Sudam Ganapati Hedke Ex.35, evidence of Dr. Bipinchandra L. Sakhiwala and the statement of the deceased at Ex.10 are so unimpeachable and inspiring confidence in the mind of the court that they are deemed to be trustworthy and the reliance could have been placed and has already been placed upon their testimony, and therefore, it is now gainsaid that the prosecution has fully succeeded bringing home the charges levelled against the appellant accused and therefore, homicide death is proved. The learned trial Judge has after weighing and appreciating the evidence came to the conclusion that the said act of the accused was not of major nature but was of culpable homicidal death not amounting to murder punishable under Sec.304 Part II of I.P.C. which does not call for any interference by this court, and therefore, the said finding is confirmed and maintained. It is held that the accused is rightly convicted by the learned trial Judge for the commission of the aforesaid offence.

18. Now it takes me to quantify the quantum of sentence awarded to the accused. It is true that the learned trial Judge imposed the sentence of seven years. It is also true that there are catana of decisions of the Apex Court and this Court that normally sentence varies from four years to seven years to the convict who has

been convicted for the commission of offence under Sec. 304 Part II of I.P.C., and therefore, the sentence of seven years to the convict offender for the commission of offence punishable under Sec. 304 Part II of I.P.C. appears to be a little harsh and stringent which requires to be modified by this court. This court, therefore, proposes to impose the sentence of four years, instead of seven years which would meet the ends of justice.

17. Resultantly, the appeal is partly allowed, and the Judgment and order of recording conviction against the appellant accused for the commission of offence punishable under Sec. 304 Part II of I.P.C. passed by the learned Additional Sessions Judge, District Bulsar at Navsari in Sessions Case No. 130 of 1996 is confirmed and maintained but the sentence of R.I. for seven years is modified and instead of sentence of seven years, the appellant accused is sentenced to suffer R.I. for four years and a fine of Rs.1,500/- and i/d of payment of fine, to undergo further period of R.I. for three months.

Date: 29/7/1998. -----

(ccs)